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COURT OF CRIMINAL APPEALS
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IN THE
COURT OF CRIMINAL APPEALS OF TEXAS

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COURT OF CRIMINAL APPEALS
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HAROLD MICHAEL MOORE,	§	
APPELLANT	§	
	§	
v.	§	**NO. PD-1056-16**
	§	
THE STATE OF TEXAS,	§	
APPELLEE	§	

§ § §

STATE'S BRIEF ON THE MERITS

§ § §

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Trial Court Judge:

Hon. George Gallagher, Judge, 396th Judicial District Court of Tarrant County, Texas

Parties to the Judgment:

Appellant, Harold Michael Moore, and the State of Texas

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THE STATE OF TEXAS,	**§**	
APPELLEE	**§**	

STATE'S BRIEF ON THE MERITS

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

This brief is filed on behalf of the State of Texas by Sharen Wilson, Criminal District Attorney of Tarrant County. The State is challenging the Second Court of Appeals' holding that the evidence is insufficient to support the trial court's affirmative deadly weapon finding.

STATEMENT OF THE CASE

Harold Michael Moore ("Appellant") entered an open plea of guilty to the offense of felony driving while intoxicated, while pleading not true to the deadly weapon allegation. TEX. PENAL CODE §§ 49.04(a), 49.09(b)(2); CR 1: 5; RR 2: 9. The trial court then found Appellant guilty, sentenced him to eighteen years' confinement, and found the deadly weapon allegation to be true.[1] CR 1: 33; RR 2

[1] Appellant also pled true to the allegations that he had violated the terms of his community

58.

On August 11, 2016, the Second Court of Appeals reversed the trial court's affirmative deadly weapon finding and affirmed the trial court's judgment as modified in a published opinion authored by Justice Gardner. *Moore v. State*, No. 02-15-00402-CR & 02-15-00403-CR, 2016 WL 4247978. Chief Justice Livingston and Justice Dauphinot were also on the panel.

On December 7, 2016, this Court granted the State's Petition for Discretionary Review to determine whether the Second Court of Appeals erred in reversing the trial court's affirmative deadly weapon finding.

ISSUES PRESENTED FOR REVIEW

1. Did the Second Court of Appeals err in misapplying the *Jackson v. Virginia* legal sufficiency standard by holding evidence the Appellant was intoxicated, caused a wreck with a stationary occupied vehicle, and disregarded a red light was legally insufficient to support a finding the Appellant's vehicle was a deadly weapon?

2. Did the Second Court of Appeals err in holding that the infliction of minor injuries or "bodily injury" by the Appellant's vehicle rendered any actual danger of causing death or serious bodily injury purely hypothetical and thus insufficient to support a deadly weapon finding?

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supervision arising out of a 2006 conviction for driving while intoxicated. RR 2: 10-12. The trial court sentenced Appellant to ten years' confinement based on this plea of true; however, this conviction was not appealed to the Second Court of Appeals and plays not role in the State's present Brief on the Merits. RR 2: 58; *Moore v. State*, No. 02-15-00402-CR & 02-15-00403-CR, 2016 WL 4247978, at *1 (Tex. App.—Fort Worth Aug. 11, 2016, pet. granted) ("In cause number 02-15-00403-CR, in the absence of any complaint, we affirm that judgment.")

3. Does a deadly weapon finding in a felony driving while intoxicated conviction require a *mens rea* of reckless conduct?

SUMMARY OF THE ARGUMENT

The evidence supports the trial court's deadly weapon finding. A rational factfinder could have found that Appellant drove his vehicle in a reckless and dangerous manner that was capable of causing death or serious bodily injury beyond a reasonable doubt.

STATEMENT OF FACTS

On November 17, 2014, at approximately 6:30 p.m., Appellant was driving his black Mercedes SUV when he caused a rear-end collision with a BMW coupe sitting stationary at a red light at the intersection of the Highway 114 service road and Dove Road in Southlake, Texas. RR 2: 14-19. S.K., the driver of the BMW, had just picked up her teenage daughter, M.K., from her SAT/ACT tutoring session. RR 2: 15. As M.K. was talking with her father on the phone, Appellant's SUV suddenly struck the BMW from behind. RR 2: 16-17. The BMW was positioned approximately four or five feet behind a white SUV at the red light. RR 2: 16. Appellant struck the BMW with such force that the BMW propelled the white SUV into the intersection, despite that fact that S.K. had her foot on the BMW's brake pedal. RR 2: 17-18. Looking in her rearview mirror, S.K. saw the black SUV as it began to reverse. *Id.* She identified Appellant as the driver of the black SUV. RR 2:

18-19.

Appellant remained at the scene of the collision, and another driver noticed that he "smell[ed] of alcohol really bad." RR 2: 21. After S.K.'s husband arrived at the scene, S.K. and her daughter were taken to the emergency room. RR 2: 22-23. Fortunately, they only sustained a few bruises, scratches, and soreness. RR 2: 14-15, 22-23. S.K. sustained a bruised knee while M.K. had pain in her back. RR 2: 23. M.K. also suffered psychological distress as a result of the collision, which included breakdowns of crying, insomnia, and nervousness while taking her driver's education class. RR 2: 24.

The collision totaled the BMW. RR 2: 23; RR 3: 80-82 (State's Exhibits 10-12). Although the BMW's airbags did not deploy during the collision, police officers would not let it leave the scene because they were concerned that any motion or movement would set off the airbags. RR 2: 22.

A forensic toxicology report reflected that Appellant's blood alcohol concentration was 0.27, more than three times the legal limit. RR 2: 12; RR 3: 4 (State's Exhibit 1); *see* TEX. PENAL CODE § 49.01(2)(b). Prior to this case, Appellant—who was sixty-nine years old at the time of his punishment hearing—had previously been convicted of numerous alcohol-related offenses throughout the 1990s and 2000s, including two misdemeanor DWI convictions out

of Denton County, two DWI convictions out of Tarrant County, and two citations for public intoxication from the city of Colleyville. RR 2: 39; RR 3: 5-78 (State's Exhibits 2-9). Additionally, Appellant was on probation for a 2006 DWI conviction at the time of the collision. RR 3: 57-70 (State's Exhibit 8).

The court of appeals held that the evidence failed to show a "rational basis for finding beyond a reasonable doubt that the accident was the product of reckless driving rather than the product of criminally negligent driving," or that the occupants of the BMW "were put in actual danger of death or serious bodily injury." *Moore*, 2016 WL 4247978 at *5-6. The court deleted the deadly weapon finding and affirmed Appellant's conviction as modified. *Id.* at *8.

ARGUMENT

In a DWI case, a vehicle deadly weapon finding is sustainable when a defendant with a 0.27 blood alcohol concentration disregarded a red light and rear-ended another occupied vehicle sitting stationary at the red light with such great force that it totaled the occupied vehicle and pushed another occupied vehicle into an intersection.

I. Vehicle as a Deadly Weapon Standard

"A deadly weapon is anything that in the manner of its actual or intended use is capable of causing death or serious bodily injury." TEX. PENAL CODE § 1.07(a)(17)(B). A reviewing court must view evidence supporting a deadly weapon finding in the light most favorable to the State to determine whether a rational

factfinder could have found that a vehicle was used or exhibited as a deadly weapon beyond a reasonable doubt. *Cates v. State*, 102 S.W.3d 735, 738 (Tex. Crim. App. 2003). To sustain a deadly weapon finding in a DWI case, the evidence must establish that the vehicle was driven in a manner that was capable of causing death or serious bodily injury. *Mann v. State*, 13 S.W.3d 89, 92 (Tex. Crim. App. 2000). This standard requires an evaluation of both (1) manner and (2) capability.

A. Manner

Although not specifically defined, the "manner" requirement is satisfied by evidence of dangerous or reckless driving. *Sierra v. State*, 280 S.W.3d 250, 255 (Tex. Crim. App. 2009). Summarizing past cases addressing manner in this context, *Tyra v. State*[2], *Mann v. State*[3], *Cates v. State*[4], and *Drichas v. State*[5], the Court in *Sierra* observed:

> in *Tyra* . . . , we characterized Tyra's driving as reckless 'enough to endanger the lives of other people' and said that Tyra was 'too drunk to control the vehicle.' And in *Mann*, . . . the evidence showed that Mann 'almost hit another vehicle head-on when his vehicle crossed the center lane.' Next, in *Cates*, we reversed the court of appeals'[] holding that the evidence was legally sufficient to sustain the deadly weapon finding because there was no evidence that Cates drove the truck in a deadly or dangerous manner during the offense of failure to stop and

[2] 897 S.W.2d 769, 799 (Tex. Crim. App. 1995).
[3] 13 S.W.3d at 92.
[4] 102 S.W.3d at 738–39.
[5] 175 S.W.3d 795, 797–98 (Tex. Crim. App. 2005).

> render aid. Finally, in *Drichas*, we observed that Drichas, in the course of evading detention with a vehicle, led law enforcement officers on a fifteen-mile high-speed chase during which he 'disregarded traffic signs and signals, drove erratically, wove between lanes and within lanes, turned abruptly into a construction zone, . . . and drove down the wrong side on the highway.' Affirming the deadly weapon finding in that case, we said that Drichas's 'manner of using his truck posed a danger to pursuing officers and other motorists that was more than simply hypothetical.'

Id. Most recently, in *Brister v. State*, the Court rejected the State's argument that the fact of driving while intoxicated, on its own, always satisfies the manner requirement. 449 S.W.3d 490, 495 (Tex. Crim. App. 2014).

B. Capability

Regarding capability, the Court has said that others must have been in danger; a hypothetical potential for danger if others had been present is insufficient. *Cates*, 102 S.W.3d at 738. Actual endangerment, however, does not require others to be "in a zone of danger" or take evasive action or require the driver to intentionally strike another vehicle. *Drichas*, 175 S.W.3d at 799. Actual endangerment may be shown when there is evidence that another motorist was on the highway at the same time and place as the defendant when the defendant drove in a dangerous manner. *Id.* "Capability is evaluated based on the circumstances that existed at the time of the offense." *Id.* "The volume of traffic . . . is relevant only if no traffic exists." *Id.* Thus,

a deadly weapon finding is not proper when few, if any, cars were in the oncoming traffic lane when the driver briefly crosses over the center line. *Brister*, 449 S.W.3d at 495.

II. Analysis

A. Manner

In conducting its manner analysis, the court of appeals set out to determine whether Appellant drove recklessly or dangerously. *Moore*, 2016 WL 4247978, at *3. To make this determination, the court considered the five factors outlined in *Cook v. State*[6]: (1) intoxication; (2) speeding; (3) disregarding traffic signs and signals; (4) driving erratically; and (5) failure to control the vehicle. *Id.* After considering each of the *Cook* factors, the court concluded that the evidence was insufficient to show that Appellant drove in a reckless or dangerous manner. *See id.* at *3-4. In reaching its conclusion, however, the court misapplied the *Jackson v. Virginia* legal sufficiency standard by (1) examining each factor in isolation rather than looking at the cumulative force of all the evidence and (2) not examining the evidence in the light most favorable to the prosecution. *See generally Jackson v. Virginia*, 443 U.S. 307 (1979) (outlining the applicable evidentiary sufficiency standard). Additionally, the court erred by grafting onto the deadly weapon

[6] 328 S.W.3d 95, 100 (Tex. App.—Fort Worth 2010, pet ref'd).

allegation a *mens rea* requirement of recklessness that does not appear in the statutory definition of a deadly weapon.

The evidence demonstrating that Appellant drove his vehicle in a reckless or dangerous manner included the following: Appellant's blood alcohol concentration was 0.27, more than three times the legal limit; Appellant disregarded a red light at an intersection; Appellant crashed his vehicle into the back of an occupied vehicle sitting stationary at the red light; Appellant hit the occupied vehicle with such great force that it was totaled; and Appellant hit the occupied vehicle with such great force that it caused a domino effect, pushing another occupied vehicle into the middle of the intersection. RR 2: 12-24; RR 3: 4 (State's Exhibit 1).

Instead of viewing the cumulative force of the evidence in the light most favorable to the State,[7] the court examined each piece of evidence in isolation, while either discounting or ignoring altogether other pieces of evidence. *See Moore*, 2016 WL 4247978, at *3-4. For example, the court effectively ignored the fact that Appellant had a blood alcohol concentration of 0.27 when, referencing *Brister*, it explained that:

> [i]ntoxicated describes the condition in which Appellant drove his vehicle. It does not describe the manner in which he drove his vehicle. His condition would probably impact

[7] *See Cates*, 102 S.W.3d at 738; *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007) (under *Jackson* standard, "cumulative force of all the incriminating circumstances" is reviewed and "[e]ach fact need not point directly and independently to the guilt of the appellant").

> his manner, but for purposes of the deadly weapon finding, *Brister* instructs us to focus on his manner.

Id. at *3. The court of appeals then conducted the remainder of its analysis without considering any evidence of Appellant's intoxication. *See id.* at *3-6. *Brister*, however, makes no mention of the condition/manner dichotomy described by the court of appeals, nor does it suggest that intoxication cannot be taken into consideration in a manner analysis. *Compare id.* at *3-6 *with Brister*, 449 S.W.3d at 490–95. Rather, *Brister* stands for the proposition that intoxication *alone* will not satisfy the manner requirement. *Id.* at 495. In this case, however, the State presented more evidence in support of its deadly weapon allegation aside from Appellant's intoxication. By discounting evidence of Appellant's intoxication and viewing that evidence in isolation from the other evidence demonstrating that Appellant drove his vehicle in a reckless or dangerous manner, the court of appeals misapplied the *Jackson* sufficiency standard. *Hooper*, 214 S.W.3d at 13.

The court of appeals utilized the same type of analysis when it examined the third *Cook* factor: disregard of traffic signs and signals. *Moore*, 2016 WL 4247978, at *4. The court discounted evidence showing that Appellant disregarded a red light, stating: "[w]e are not prepared to say a single failure to regard a traffic sign or signal, without more information, constitutes a reckless manner of the defendant's use of the vehicle." *Id.* Once again, the court of appeals viewed this evidence in isolation

from the other evidence tending to show that Appellant drove recklessly or dangerously, such as his intoxication and the fact that he collided into and totaled one occupied vehicle, while pushing another vehicle into an intersection.

Aside from misapplying the *Jackson* legal sufficiency standard, the court of appeals further erred in its manner analysis by grafting onto the deadly weapon allegation a *mens rea* requirement of recklessness that does not appear in the statutory definition of a deadly weapon. *Id.* at *5. Citing to *Sierra*, the court stated: "[t]he offense of driving while intoxicated does not require a *mens rea* . . . . The deadly weapon finding, however, requires a *mens rea* of reckless or, alternatively, 'dangerous' conduct." *Id.* In concluding that the evidence was insufficient to show that Appellant drove recklessly, the court of appeals explained that the trial court had "no rational basis for finding beyond a reasonable doubt that the accident was the product of reckless driving rather than the product of criminally negligent driving." *Id.*; TEX. PENAL CODE § 6.03(c).

However, by requiring a showing of a *mens rea* of recklessness, the court of appeals effectively added an additional element to the definition of "deadly weapon" that is not required by statute. *See* TEX. PENAL CODE § 1.07(a)(17)(B) (not requiring a culpable mental state). Additionally, the court misconstrued the way in which this Court evaluated recklessness in *Sierra*. *Sierra* makes no mention of the reckless vs.

criminally negligent distinction the court of appeals drew in arriving at its conclusion. *Sierra*, 280 S.W.3d at 255–56. Rather, *Sierra* used the term "reckless" to describe *how* the appellant in that case was driving—not the appellant's mental state: "[c]onsidering all of these facts, a jury could reasonably find that Sierra was speeding and failed to maintain control of his SUV. Therefore, it was reasonable for the jury to conclude that Sierra's driving was dangerous and reckless while intoxicated." *Id.* at 256. In the same way, the trial court in this case could have reasonably concluded that Appellant's driving was reckless and dangerous based on the driving facts—Appellant's intoxication, disregarding a red light, and causing a collision that totaled one occupied vehicle and pushed another into an intersection.

Alternatively, even if the court of appeals is correct that a deadly weapon finding requires a showing of a *mens rea* of recklessness as defined by penal code section 6.03(c), the evidence was sufficient to support the trial court's conclusion that Appellant acted recklessly. The trial court could have concluded that—based on the fact that Appellant consumed alcohol to the point that he was more than three times over the legal limit and then proceeded to operate a motor vehicle—Appellant was aware of but consciously disregarded an unjustifiable risk that his conduct was capable of causing death or serious bodily injury. *See* TEX. PENAL CODE §§ 1.07(a)(17)(B), 6.03(c), 49.01(2)(B). The trial court was permitted to infer

Appellant's recklessness from his actions. *See Guevara v. State*, 152 S.W.3d 45, 50 (Tex. Crim. App. 2004) ("Intent may also be inferred from circumstantial evidence such as acts, words, and the conduct of the appellant.").

B. Capability

In evaluating capability, the court of appeals examined whether S.K. and M.K. were put in actual danger of death or serious bodily injury. *Moore*, 2016 WL 4247978, at *6. The court held that although the evidence showed S.K. and M.K. were endangered, "there is no evidence showing that they were put in actual danger of death or serious bodily injury." *Id.* It reasoned that because S.K. and M.K. suffered minor physical injuries, they experienced only "bodily injury" as defined by the penal code—not "serious bodily injury." *See* TEX. PENAL CODE §§ 1.07(a)(8), (46). The court concluded: "there is no rational basis for finding beyond a reasonable doubt that the danger S.K. and her daughter were exposed to exceeded the injuries they actually experienced." *Id.* In reaching its conclusion, however, the court of appeals erred by misapplying the penal code's requirement that a deadly weapon only be "capable" of inflicting death or serious bodily injury. TEX. PENAL CODE § 1.07(a)(17)(B); *Tucker v. State*, 274 S.W.3d 688, 691 (Tex. Crim. App. 2008).

The court of appeals focused squarely on the fact that S.K. and M.K. sustained only minor injuries as a result of being hit by Appellant's vehicle. *Id.* at *6-7. The

court never considered whether Appellant's SUV was otherwise *capable* of causing death or serious bodily injury, explaining that: "[w]e know precisely the extent of danger [S.K. and M.K.] were exposed to because of the accident, and the extent of their injuries does not meet the definition of death or serious bodily injury." *Id.* at *6. The court appeared to indicate that where an alleged deadly weapon causes injuries that do not in fact rise to the level of death or serious bodily injury, courts are either foreclosed from determining or not required to determine whether the alleged deadly weapon was nevertheless *capable* of causing death or serious bodily injury. *See id.* at *6. Any such consideration, according to the court of appeals, would require speculation, and "speculation is not proof beyond a reasonable doubt." *Id.*

That type of capability analysis, however, is neither provided for by statute nor by case law; in fact, it runs contrary to both. Section 1.07(a)(17)(B)'s plain language requires only that a deadly weapon be capable of causing death or serious bodily injury. TEX. PENAL CODE § 1.07(a)(17)(B). The penal code contains no provision indicating that a deadly weapon finding is foreclosed when the injuries sustained by the alleged deadly weapon do not in fact amount to death or serious bodily injury. Similarly, this Court has explained that "[t]he State is not required to show that the 'use or intended use causes death or serious bodily injury' but that the 'use or intended use is *capable* of causing death or serious bodily injury.'" *Tucker*,

274 S.W.3d at 691 (*quoting McCain v. State*, 22 S.W.3d 497, 503 (Tex. Crim. App. 2003)) (emphasis in original).

Although the court of appeals cited to *Drichas* to support its conclusion that S.K. and M.K. were not placed in actual danger of death or serious bodily injury, it overlooked the fact that *Drichas* provided an example of what would constitute actual endangerment: "a deadly weapon finding is appropriate on a sufficient showing of actual danger, such as evidence that another motorist was on the highway at the same time and place as the defendant when the defendant drove in a dangerous manner." *Drichas*, 175 S.W.3d at 799. In this case, evidence was presented that at least two motorists were on the road when Appellant drove dangerously by being intoxicated, disregarding a red light, and causing a destructive collision. *See supra* Part I. According to *Drichas*, that evidence alone is sufficient to support a finding that Appellant's vehicle was capable of causing death or serious bodily injury. *See Drichas*, 175 S.W.3d at 799.

By concluding that Appellant's vehicle was not capable of causing death or serious bodily injury due to the fact that S.K. and M.K.'s injuries did not in fact result in death or serious bodily injury, the court of appeals effectively imposed a higher burden on the State than is provided for by statute or case law. The fact that two motorists were on the road at the same time and place as Appellant when

Appellant caused a collision is sufficient evidence of actual danger so as to satisfy the capability requirement. *Id.* Furthermore, a motor vehicle driven with enough force to total one vehicle and push yet another vehicle into an intersection is capable of causing death or serious bodily injury. The fact that Appellant's vehicle did not actually cause death or serious bodily injury does not foreclose a determination that it was capable of doing so. *See* TEX. PENAL CODE § 1.07(a)(17)(B); *Drichas*, 175 S.W.3d at 799.

CONCLUSION

Appellant drove his vehicle in a reckless and dangerous manner that was capable of causing death or serious bodily injury. *Mann*, 13 S.W.3d at 92. Thus, the trial court did not err in finding the State's deadly weapon allegation to be true. Evidence supporting the trial court's affirmative deadly weapon finding included the following: Appellant had a 0.27 blood alcohol concentration; Appellant disregarded a red light; Appellant crashed his vehicle into the back of an occupied vehicle sitting stationary at the red light; Appellant hit the occupied vehicle with such great force that it was totaled; and Appellant hit the occupied vehicle with such great force that it caused a domino effect, pushing another occupied vehicle into the middle of the intersection. RR 2: 12-24; RR 3: 4 (State's Exhibit 1). Viewing the evidence in the light most favorable to the State, a rational factfinder could have found that

Appellant's vehicle was used or exhibited as a deadly weapon beyond a reasonable doubt. *Cates*, 102 S.W.3d at 738.

PRAYER FOR RELIEF

The facts and testimony supported the trial court's affirmative deadly weapon finding. The decision of the court of appeals should be reversed and the deadly weapon finding reinstated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

True copies of the State's brief on the merits have been electronically served on opposing counsel, the Hon. William R. Biggs (wbiggs@williambiggslaw.com), on this, the 4th day of January, 2017.

/s/ Landon A. Wade
LANDON A. WADE

CERTIFICATE OF COMPLIANCE

This document complies with the typeface requirements of Tex. R. App. P. 9.4(e) because it has been prepared in a conventional typeface no smaller than 14-point for text and 12-point for footnotes. This document complies with the word-count limitations of Tex. R. App. P. 9.4(i) because it contains approximately 3,878 words, excluding those parts specifically exempted by Tex. R. App. P. 9.4(i)(1), as computed by Microsoft Office Word 2010 - the computer program used to prepare the document.

/s/ Landon A. Wade
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